Supreme Court, U.S.
FILED

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No._____

In The

# Supreme Court of the United States

1996 Term

CHERIEL JENSEN,

Appellant & Petitioner,

vs.

ROBERT S. GOULD,
DOES 1 THROUGH 10

Appellees & Respondents

No. HO14446

PETITION FOR WRIT OF CERTIORARI TO THE
CALIFORNIA SIXTH DISTRICT COURT OF APPEALS

## APPENDIX
## TO PETITION FOR WRIT OF CERTIORARI

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65 pp

## DECLARATION OF CHERIEL JENSEN

I, CHERIEL JENSEN, declare the contents attached are true and correctly transcribed text of Orders and determinations which are the subject of my Petition for Writ of Certiorari:

Appendix 1. Order denying Petition for Review, California Supreme Court, #S056130, filed and entered November 13, 1996. p. 5

[California Supreme Court's Order extending Supreme Court's time for determination, not reproduced.]

Appendix 2. Order of the California Court of Appeals for the Sixth District, #HO14446, affirming the judgment of the California Santa Clara County Superior Court, filed and entered August 6, 1996. pp. 6-23

Appendix 3. Judgment of Dismissal by the Court, Judge Peter G. Stone, Superior Court of Santa Clara County #730488, filed August 21, 1995. p. 24

Appendix 4. Order Sustaining Defendant Gould, M.D., without leave, Judge Peter G. Stone, Superior Court of Santa Clara County, #730488, filed August 21, 1995. pp. 25-26

Appendix 5. Letter from Cheriel Jensen, Plaintiff, to Judge Peter G. Stone discussing differences in Judge Stone's order and Judge Levinger's order and Judge Levinger's findngs in the transcripts, #730488, August 16, 1995,. pp. 27-30

Appendix 6. Order Sustaining Demurrer without leave, #730488, Peter G. Stone, Superior Court of California, County of Santa Clara, August 2, 1995. p. 31

Appendix 7. Order Sustaining Demurrer and Denying Motions for Summary Judgment, Judge Mary Jo Levinger, Superior Court of California, County of Santa Clara, #730488, May 9, 1995. pp. 32-33

Appendix 8. Partial Transcripts, Judge Mary Jo Levinger, Hearing on Demurrer and Summary Judgment Motions, #730488, April 25, 1995. pp. 34-37

Appendix 9. Order, Judge Leslie Nichols, Denying Motion for Punitive Damages, Superior Court of California, County of Santa Clara, #730488, filed October 13, 1994. p. 38

Appendix 10. Order on Plaintiff's Motion for Protective Order, Jessica A. Frischling, Commissioner of the Superior Court, #730488, March 18, 1994. pp. 39-40

Appendix 11. Granting Motion To Dismiss For Failure To State A Claim Upon Which Relief Can Be Granted And Denying Motion For Entry Of Default Judgment, Judge James Ware, United States District Court for the Northern District of California, San Jose, #730488, filed April 14, 1994. pp. 41-48

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I declare under penalty of perjury that the following are true and correct text of the above listed orders and determinations which are the subject of this Petition.

EXECUTED on February 11, 1997

By: _____

CHERIEL JENSEN

Respectfully submitted February 11, 1997

By: _____

CHERIEL JENSEN

**Appendix 1**

CALIFORNIA SUPREME COURT

FILED

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Robert Wandruff Clerk

Deputy

Sixth Appellate District No. H014446
SO56130

CHERIEL JENSEN, Appellant
v.

ROBERT S. GOULD, M.D, Respondent

Appellant's petition for review is DENIED.

GEORGE

(Stamped)

Chief Justice

## Appendix 2

*[stamped]* **FILED AUG 6, 1996**
NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

| | | |
|---|---|---|
| CHERIEL JENSEN | ) | |
| Plaintiff and Appellant | ) | HO14446 |
| v. | ) | (Santa Clara County |
| ROBERT S. GOULD, M.D. | ) | Super. Ct. No |
| | ) | 730488) |
| Defendant and Respondent. | ) | |

Plaintiff Cheriel Jensen appeals for a judgment dismissing her fourth amended complaint without leave to amend, following an order sustaining the demurrer of defendant Robert S. Gould, M.D. Because we agree with the trial court that the fourth amended complaint fails to state a cause of action, and find no error by the trial court regarding other issues raised by plaintiff, we affirm the judgment.

### I. BACKGROUND

#### A. Scope of Review

A general demurrer presents the same question to the appellate court as to the trial court: whether the plaintiff has alleged sufficient facts in the complaint to justify relief on any legal theory. (*B & P Development Corp.* v. *City of Saratoga* (1986) 185 Cal.App.3d 949, 952-953.) "The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The court does not, however, assume the truth of contentions, deductions, or conclusions of law. The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken.' However it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry* v. *Tri-City Hospital Dist.* (1992) 2 Cal4th 962, 966-967,

citations omitted.) We review the material allegations of the fourth amended complaint in light of these principles.[1]

B. Plaintiff's Allegations

According to the fourth amended complaint, on October 7, 1991, plaintiff attended her first and only scheduled appointment with Dr. Robert S. Gould. Plaintiff had been referred to Dr. Gould for neurological testing to investigate the extent of damage to her nerves. Plaintiff brought with her various medical records, including x-rays, magnetic resonance images, and test results.

Plaintiff alleges that Dr. Gould negligently refused to review these materials or perform the test for which she had come, and "instead repeatedly, vehemently and without foundation of any kind accused (her) of being depressed asserting that depression was responsible for her allergies. Then asserting he was a psychiatrist, defendant negligently repeatedly, falsely and without foundation or knowledge of plaintiff, vehemently accused her of being suicidal." Plaintiff alleges that Dr. Gould was not certified in psychiatry. Upon Dr. Gould's next absence, plaintiff dressed and left the examining room but was compelled to slowly squeeze past defendant Gould to exit his office, as standing with assistants in the hallway outside of the examining room, defendant Gould moved to block and physically stop her exit with his bulk." Plaintiff asserts that by the time she had dressed, Dr. Gould had called police "in his intentionally negligent, slanderous and malicious attempt to commit her . . . ."

Plaintiff left Dr. Gould's office and returned to her workplace. Plaintiff alleges that in addition to contacting police, Dr. Gould "negligently transmitted" false allegations to her husband by telephone, and negligently transmitted slanderous communication to her supervisor's supervisor. Plaintiff alleges that after Dr. Gould's call to police, "defendant Gould's slander was broadcast through county communications (plaintiff's union colleagues), to all emergency services in the county, and by an all-points-bulletin to all persons then monitoring countywide emergency services, in violation of plaintiff's privacy."

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1 As required by this standard of review, in reviewing the trial court's order sustaining the demurrer, we have accepted as true the material facts properly pleaded in the fourth amended complaint, and have not considered the "facts" set forth by defendant in other documents.

Plaintiff alleges that after Dr. Gould's call to police, she "was arrested in her workplace in front of her colleagues under visible threat of handcuffing, and interrogated in her workplace in front of her colleagues." Plaintiff claims that as a result of this "false arrest," she was kept from attending the primary part of her medical treatment that day," and "delayed and traumatized to the point that treatment given resulted in severe pain, trauma and loss of sleep." She also alleges that Dr. Gould's acts were "proximate contributing causes" of her de facto dismissal from her job.[2]

Plaintiff also alleges that Dr. Gould published false allegations of suicide threats to her family doctor "and thence to [her] treating neurosurgeon," which caused her family doctor and neurosurgeon to abandon her, and caused her to be unable to reestablish medical care "for another nine months during which time she continued to be repeatedly exposed to unnoticed and improper application of pesticide without a doctor to recognize her condition or treat her." She alleges that as a result, her injuries increased, and after the final episode of exposure through July 1, 1992, she became disabled. Plaintiff alleges that she has numerous medical conditions, some of which existed before her visit to Gould "but the impact was increased and these conditions were joined upon the final series of pesticide exposures in plaintiff's workplace . . . ."[3]

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2 Plaintiff alleges: "Though she has seniority by contract and had never had workplace criticism, after the spectacle and this slanderous communication, her workplace status was destroyed, and thus after she was disabled from the repeated pesticide exposure, instead of allowing her to work off-site as requested and allowed in other cases, she was placed on involuntary leave, refused accommodation, and defacto dismissed."

3 Plaintiff alleges various conditions, with those marked with asterisks "manifest in some degree before October 7, 1991 . . . .": "General damages hereunder include pain and severe trauma flowing out of [Dr. Gould's acts, and additional nervous system damage*; excruciatingly painful muscle spasms*; immune system damage - - including but not limited to insufficient immunoglobulin, insufficient IgG's (all classes), IgA's, and CD8 immune system components; increased susceptibility to illness; frequent illness*; frequent life threatening anaphylaxis from many foods, antibiotics, chemicals and molds: other frequent emergency conditions which have included but are not limited to pneumonia, rapid clumping of blood cells upon slight exposure to chemicals including but not limited to alcohol,

Plaintiff also alleges that Dr. Gould submitted "false allegations" pursuant to a subpoena in her worker's compensation action, and these allegations "were used to, and did defeat her credibility before the Worker's Compensation Board."

Plaintiff claims that that "[t]he National Medical Enterprises, Inc. fraud then underway across the country was the pattern for the action of Gould - - to commit just anybody well insured to fraudulently collect and use up their insurance," and alleges that because her medical insurance policy at the time was "worth over a million dollars[,] she was at risk for a very long commitment had Gould succeeded."

Plaintiff seeks injunctive relief and various damages, including sums for the loss of her job, lost earning capacity, additional food expenses, and expenses for specially formulated medicine and supplements.

C. Procedural History

Plaintiff commenced this state court litigation on April 9, 1993. Dr. Gould successfully demurred to three earlier versions of plaintiff's complaint. On these previous occasions the trial court granted leave to amend.

Plaintiff's fourth amended complaint was filed May 10 , 1995. Dr. Gould again demurred, and the trial court sustained the demurrer without leave to amend.[4] A judgment

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pesticide and perfume, and collapse therefrom; episodic and ongoing pain* and fatigue*; (advice of) probability of cancer; severely depressed hormone utilization; brain damage including but not limited to frequent brain swelling; headache; eye damage*; inner ear damage* with periodic hearing loss; cervical spine damage*; gastrointestinal system damage*; blood cell fragility and internal bleeding*; severe allergies; skin damage*; probable shortened life span; severely restricted diet . . . ."

4 The trial court's order of August 21, 1995, states, in part: "pursuant to Code of Civil Procedure section 430.10 (e), the allegations of plaintiff's fourth amended complaint fail to state facts sufficient to constitute any cause of action against defendant GOULD, M.D., because (1) Dr. Gould's report of plaintiff's suicide threat was privileged under Code of Civil Procedure section 47(b)(3) and therefore is not actionable, (2) Dr. Gould had an obligation to report his perception of plaintiff's suicide threat and compliance with his duty does not give rise to liability, (3) plaintiff's Fourth Amended Complaint does not plead any facts that would give her a cause of action, (4) Dr. Gould is exempt from liability for reporting plaintiff's suicide threat, by statute and under California law, (5) plaintiff's fourth amended

of dismissal was entered on August 21, 1995, and this appeal followed. Additional facts and procedural history relevant to the issues on appeal are discussed below.

## II. DISCUSSION

### A. Communication During Police Investigation

Because many of plaintiff's claims in this case arise from the communication by Dr. Gould to the Los Gatos Police, we first consider whether that communication was privileged. Defendant argues, and the trial court agreed, that Dr. Gould's report to the police that plaintiff had threatened suicide was absolutely privileged pursuant to Civil Code section 47, subdivision (b) as part of an "official proceeding authorized by law."

This court has previously held that communications made to police officers to prompt investigation into suspected wrongdoing or illegal activity are absolutely privileged. In *Hunsucker* v. *Sunnyvale Hilton Inn* (1994) 23 Cal.App.4th 1498, a hotel manger telephoned police to report his belief that a guest had a gun in his room. The police arrived at the hotel, handcuffed Mr. Hunsucker for approximately five minutes, questioned his wife and children, searched the room, and detained the group for approximately 30 minutes before they determined that he presented no threat. The Hunsuckers sued the hotel for false imprisonment, assault and battery, and deprivation of civil rights. This court held that the manager's report to the police, resulting in the alleged torts, was absolutely privileged under Civil Code section 47. "'In our view, communication concerning possible wrongdoing, made to an official government agency such as a local police department, and which communication is designed to prompt action by that entity, is an much a part of an "official proceeding" as a communication made after an official investigation has commenced.'" (*Hunsucker*, *supra*, 23 Cal.App.4th at p. 1503, citing *Williams* v. *Taylor* (1982) 129 Cal.App.3d 745, 753-754.)

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complaint is a sham and must be disregarded. [¶] The Fourth Amended Complaint is also uncertain, ambiguous and unintelligible within the meaning of Code of Civil Procedure section 430.10(f). Plaintiff has been given five opportunities to set forth one or more congnizable causes of action, but has failed or refused to do so."

The policy underlying the privilege is "to encourage the utmost freedom of communication between citizens and public authorities." (*O'Shea* v. *General Telephone Co.* (1987) 193 Cal.App.3d 1040, 1048.) As this court noted in *Hunsucker*, for such investigation to be effective, there must be an open channel of communication by which citizens can call attention to suspected wrongdoing. "'That channel would quickly close if its use subjected the user to a risk of liability for libel. A qualified privilege is inadequate under the circumstances . . . . [¶] The importance of providing to citizens free and open access to government agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual. Thus, the absolute privilege is essential."'" (23 Cal.App.4th at pp. 1503-1504; see also *King* v. *Borges* (1972) 28 Cal.App.3d 27, 34.)

In this case, Dr. Gould's report to the police was designed to prompt police action pursuant to section 5150 of the Welfare and Institutions Code. Section 5150 provides, in part, that "[When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer . . . or other professional person designated by the county may, upon probable cause, take . . . the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation."

Although it is not necessarily an investigation of suspected criminal activity, a police investigation of whether a person should be taken into custody and transported to an approved facility for 72-hour treatment and evaluation under Welfare and Institutions Code section 5150 is an important official duty performed by trained professionals for the protection of both the person involved and the general public. The rationale of the privilege for publications made in "official proceeding authorized by law," encouraging the utmost freedom in communication between citizens and public authorities performing official duties, clearly applies here. We have no difficulty concluding as a matter of law that the communication of plaintiff's suicide threat to the police, in order to initiate as investigation of whether plaintiff should be taken into custody pursuant to section 5150 of the Welfare and Institutions Code, is part of an "official

proceeding" within the meaning of Civil Code section 47, subdivision (b). Dr. Gould's report of plaintiff's suicide threat to the police to prompt the investigation here was thus absolutely privileged.

Because the privilege is absolute, it insulates from liability even malicious publication. (Cf. *Passman* v. *Torkan* (1995) 34 Cal.App.4th 607, 618-619; 5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 498, p. 585.) Therefore, even taking as true plaintiff's assertions that she did not make a suicide threat, that Dr. Gould was incorrect or malicious in reporting that she had, that his motive was insurance fraud, and that the police report reflects Dr. Gould's malice, no liability arises from Dr. Gould's report.

Plaintiff argues that "[a]ny immunity under [Civil Code section] 47 depends upon good faith reporting. Gould's reporting was in bad faith." The case of *Fenelon* v. *Superior Court* (1990) 223 Cal.App.3d 1476 would support plaintiff's view. The Fenelon court held that because the police department is not a quasi judicial body, a false police report is not absolutely privileged, but is privileged only is it is made without malice. (223 Cal.App.3d at p. 1483.) In *Hunsucker, supra,* however, this court expressly disagreed with Fenelon, holding that reports made by citizens to police regarding potential criminal activity fall within the Civil Code section 47 absolute privilege. (*Hunsucker supra*, 23 Cal.App.4th at pp. 1502-1503.) Since Hunsucker, other courts have also held that reports of suspected criminal activity made to an investigative agency are absolutely privileged. (See, e.g., *Fremont Comp. Ins. Co.* v. *Superior Court* (1996) 44 Cal.App.4th 867, 875 [report to district attorney and Department of Insurance); *Passman* v. *Torkan, supra,* 34 Cal.App.4th at pp. 618-619 [letter to district attorney].)

We note that although plaintiff was questioned at her workplace by a police officer, she does not allege that she was transported to a mental health facility or placed in such a facility at any time. The officer apparently determined that there was no probable cause to detain her. Under these circumstances, we need not consider whether plaintiff could

state a claim if she had been transported to a facility for 72-hour treatment and evaluation.[5]

From the facts alleged by plaintiff, we also conclude that Dr. Gould's alleged communications with plaintiff's husband and his secretary and plaintiff's employer occurred in the course of the police investigation.[6] and are absolutely privileged. Under the circumstances here, where police had a duty to find plaintiff and locate her at her workplace, it would have been virtually impossible to avoid communications with plaintiff's husband and employer during the course of the investigation.[7] Similarly, the radio broadcast of a bulletin to emergency services occurred in the course of the police

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5 Plaintiff correctly notes that Welfare and Institutions Code section 5150 provides for civil liability of a person giving a statement under some circumstances. Under section 5150, for a person to be placed in a facility for 72-hour treatment and evaluation, the facility shall require an application in writing stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person (designated by the county), such person shall be liable in a civil action for intentionally giving a statement which he or she knows to be false." (Welf. & Inst. Code, § 5150, emphasis added.) Plaintiff was not, however, taken into custody pursuant to this section. The deprivation of liberty in the case of a person placed in a facility for 72 hour treatment and evaluation is significantly different from the injury allegedly suffered by plaintiff her during brief questioning.

6 Although in one portion of the complaint plaintiff alleges that the communication with her employer occurred on "October 7, 1992," elsewhere in the complaint plaintiff alleges that Dr. Gould stated to her employer that she "had threatened suicide in his office that morning . . .," indicating that the communication occurred during the course of the investigation by police. We consider this allegation, which is consistent with plaintiff's other allegations and earlier complaints to be an admission that the communication with her employer occurred on the October 7, 1991, the date of her office visit with Dr. Gould.

7 The absolute immunity of the privilege "attaches if the publication, (1) was made in an official proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objectives of the proceeding; and (4) involved litigants or other participants authorized by law." (*Lebbos* v. *State Bar* (1985) 165 Cal.App.3d 656, 668; cf *Long* v. *Pinto* (1981) 126 Cal.App.3d 946, 950-951.)

investigation, and was within the scope of the absolute privilege. Because these communications are absolutely privileged under the facts here, they cannot form a basis for the tort claims alleged by plaintiff.

B. Communication with Plaintiff's Physicians

Plaintiff alleges that Dr. Gould published false allegations of suicide threats "sent to her family doctor, and thence to plaintiff's treating neurosurgeon . . ." and as a result "her family doctor abandoned her and her neurosurgeon handed her off." It is clear from plaintiff's fourth amended complaint and earlier pleadings[8] that Dr. Gould is a physician. It is also clear that plaintiff was referred to him, and went to see him, for the purpose of medical consultation.

Civil Code section 56.10, subdivision (c) provides, in part: "A provider of health care may disclose medical information as follows: [¶] (1) The information may be disclosed to providers of health care or other health care professionals or facilities for the purposes of diagnosis or treatment of the patient. . . ." Plaintiff contends that the letter contains "no test data" but only false allegations, and that as a result plaintiff experienced the rejection of her doctors, continued to be exposed to pesticides, was unable to obtain medical care, and dared not continue to seek care until it was too late and she was disabled."

Despite plaintiff's allegations regarding her damages and Dr. Gould's motivations, however, it is clear that the facts alleged by plaintiff reveal a report by a physician regarding a patient to a referring physician, and perhaps to a neurosurgeon treating the same patient. Even accepting plaintiff's allegation that the diagnosis and information were incorrect, the disclosure to these other physicians was authorized pursuant to Civil Code section 56.10, subdivision (c) for the purpose of diagnosis or treatment of the patient. The disclosure thus cannot form the basis for the tort claims asserted by plaintiff.

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8 Plaintiff's first amended complaint alleges: "Defendant Robert S. Gould, M.D. is a physician, at the times during these events doing business within the jurisdiction [of] this court . . . ." Plaintiff has not made an inconsistent allegation or explained any reason for a different allegation. (Cf. *Owens* v. *Kings Supermarket* (1988) 198 Cal.App.3d 379, 384 [court may take judicial notice of prior pleadings].)

c. Plaintiff's First Five Causes of Action

Plaintiff's first cause of action is for negligence. She does not seek to assert a malpractice claim.[9] Instead, she alleges essentially that Dr. Gould negligently communicated with police, plaintiff's husband, employer and physicians and attempted to have plaintiff committed. Based on the privileges of Civil Code section 47, subdivision (b) and section 56.10, subdivision (c), explained above, plaintiff's negligence claim is based upon privileged communications, and fails to state a cause of action. As this court stated in *Hunsucker*, and in *Silberg* v. *Anderson* (1990) 50 Cal.3d 205, 215-216, the California Supreme Court made it clear that the privilege of section 47 applies to bar all tort actions, except for malicious prosecution, that are based upon a communication of the proper type." (*Hunsucker* v. *Sunnyvale Hilton Inn, supra*, 23 Cal.App.4th at p. 1502.)

Plaintiff's second cause of action for invasion of privacy and her third cause of action for libel and slander are also based upon Dr. Gould's privileged statements and conduct, and thus fail to state a cause of action. Defamation is defined in part as an "unprivileged" publication (Civ. Code §§ 44, 45, 46) which is not shown on the facts alleged here. In light of the failure of these claims, plaintiff's fourth cause of action for intentional infliction of emotional distress, which rests on the same underlying facts, also fails. Plaintiff has failed to allege any "'extreme (or) outrageous conduct'" by the defendant which is necessary for such a claim. (Cf. *Potter* v. *Firestone Tire & Rubber Co.* (1993) 6 Cal.4th 965, 1001.) Defendant's demurrer was also properly sustained as to plaintiff's fifth cause of action for "negligent interference with employment," which is also based upon Dr. Gould's privileged conduct. (Cf. *Doctors' Co. Ins. Services* v. *Superior Court* (1990) 225 Cal.App.3d 1284 (similar absolute privilege for communications in the course of litigation barred claims for interference with prospective economic advantage).)

D. Production of Records in Response to Subpoenas

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9 In her brief on appeal, plaintiff states: "The complaint is not a malpractice action in which standard of care is the central focus. All Gould acts complained of took place after Plaintiff had left his office rejecting his 'care.'"

In her sixth cause of action (intentional interference with prospective civil action (intentional interference with prospective civil action by spoliation of evidence'), plaintiff claims that Dr. Gould's records were produced in response to plaintiff's employer's subpoena in her worker's compensation action, and that Dr. Gould's production "materially influenced and was the proximate cause of defeat of plaintiff's initial [worker's compensation] cases and has spoiled the evidence and materially prejudiced her cumulative injury worker's compensation claim."

Civil Code section 56.10, subdivision (b) (3), provides: "A provider of health care shall disclose medical information if the disclosure is compelled by any of the following: . . . (3) By a party to a proceeding before a court or administrative agency pursuant to a subpoena, subpoena duces tecum, notice to appear served pursuant to Section 1987 of the Code of Civil Procedure, or any provision authorizing discovery in a proceeding before a court or administrative agency."

Section 1985.3 of the Code of Civil Procedure governs the procedure for serving a subpoena duces tecum of personal records of one who has used the services of a "witness" who was a physician. That section requires the subpoenaing party (1) to serve a copy of the subpoena duces tecum on the consumer or his or her attorney within certain time limitations, (2) to provide the witness (physician) with a proof of service indicating that the consumer has been advised of the issuance of the subpoena, or the consumer's written authorization to release the records, and (3) to notify the consumer that his or her records are being sought from the witness, that the consumer has a right to object, and that the consumer has the right to seek the services of an attorney in order to protect his or her rights of privacy. Code of Civil Procedure section 1985.3 also specifies in subdivision (g) what consumers, such a plaintiff, can do if they object to the production of their personal records pursuant to the subpoena.

In this case, plaintiff does not allege any irregularity in the services of the subpoena or the notices required by Code of Civil Procedure section 1985.3, nor does she allege that she objected to the production in the underlying worker's compensation proceeding. She claims only that Dr. Gould had the obligation to notify her, to claim the privilege, and to

produce only records she defines a pertinent to her claims. This is incorrect. Under section 1985.3, if plaintiff had objections regarding Dr. Gould's records, she could have taken action to object to the production of his records. (See Code Civ. Proc., § 1985.3, subd. (g).) Her concerns regarding the scope of production, the relevance of the documents, or her privacy rights should be directed to the court or administrative body overseeing the underlying litigation which prompted the subpoena(s).

Plaintiff argues that Dr. Gould was required to assert her evidentiary privilege in medical information pursuant to section 994 of the Evidence Code. The privilege established by Evidence Code section 994 is however, expressly subject to section 912 of the Evidence Code. Section 912 provides for waiver of the privilege with respect to a protected communication if the holder of the privilege has consented to such disclosure. It also provides that consent to disclosure may be manifested by conduct "including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege." (Evidence Code, § 912, subd. (a).) In the absence of any allegation that plaintiff made an objection to the production of Dr. Gould's records, she waived the privilege, and Dr. Gould was required to comply with the subpoenas.

Plaintiff also apparently claims that in producing his records, Dr. Gould produced "a carefully stripped file" which was "missing" a letter from plaintiff's attorney "which would have shown [Dr. Gould's} records in contention." Accepting as true plaintiff's allegation that Dr. Gould did not produce a letter from plaintiff's attorney, we are not persuaded that plaintiff has stated a cause of action for spoliation of evidence. (Cf *Smith* v. *Superior Court* (1984) 151 Cal.App.3d 491 [evidence necessary for plaintiff's case destroyed].) Here, the letter in question was not a medical record, but originated with plaintiff. Plaintiff has not alleged that any records originating with plaintiff or her attorney were subpoenaed from Dr. Gould. In any event, plaintiff retained the ability to use the letter in the litigation, if appropriate. Plaintiff has thus failed to state a cause of action for spoliation of evidence.

E. Welfare and Institutions Code Section 5203

Plaintiff's seventh cause of action seeks damages for a "false application for petition" pursuant to Welfare and

Institutions Code section 5203. Welfare and Institutions Code sections 5200 through 5230 provide a procedure whereby private parties may obtain a court-ordered evaluation of "[a]ny person alleged, as a result of mental disorder, to be a danger to others, or to himself, or to be gravely disabled . . . ." (Welf. & Inst. Code, § 5200.) This procedure contemplates that a private party will make allegations in a petition to a county officer designated to receive such petitions, requesting that an evaluation of the person be made (Welf. & Inst. Code, § 5201), and that officer will conduct a screening. If the person refuses voluntary treatment and the county officer has probable cause to believe the person is, as a result of mental disorder, a danger to others, or to himself or herself, or is gravely disabled, the county officer shall file a petition with the superior court. (Welf. & Inst. Code 5202.) On a satisfactory showing, the court may issue an order and may compel the person, if still unwilling to cooperate, to undergo evaluation. (Welf. & Inst. Code, § 5206.)

As part of this statutory scheme for court ordered evaluation, section 5203 of the Welfare and Institutions Code provides: "Any individual who seeks a petition for a court-ordered evaluation knowing that the person for whom the petition is sought is not, as a result of mental disorder, a danger to himself, or to others, or gravely disabled is guilty of a misdemeanor, and may be held liable in civil damages by the person against whom the petition was sought." Section 5203 thus concerns liability for improperly seek a petition for a court-ordered evaluation of a patient.

This section is different from Welfare and Institutions Code section 5150, which authorizes peace officers, members of a designated evaluation facility, or other professional persons designated by the county to take a person into custody upon probable cause that, as a result of a mental disorder, the person is a danger to self or others, or gravely disabled. As noted earlier, here it appears that a peace officer concluded that no probable cause existed to take plaintiff into custody pursuant to section 5150. Plaintiff does not allege, and nothing in the facts alleged by the fourth amended complaint indicates, that Dr. Gould ever sought a court-

ordered evaluation of plaintiff.[10] Accordingly, defendant's demurrer to this cause of action was properly sustained.

Plaintiff contends that her "arrest" was "without service of order, petition, warrant, advice of rights, attorney present on questioning, or any other due process safeguard," and was "without cause." Welfare and Institutions Code section 5150 however, does not require judicial supervision or service of documents before a person may be questioned by a police officer. Although section 5150 requires "probable cause" before a person is taken into custody and placed in a facility for 72-hour treatment and evaluation, no such 72 hour placement occurred here. Plaintiff's arguments that no statement of probable cause was issued and that she did not meet the criteria for probable cause are thus inapplicable to the facts alleged here. Plaintiff's seventh cause of action therefore fails to state a cognizable claim.

For the reasons explained above, defendant's demurrer was properly sustained as to each of the causes of action in the fourth amended complaint. We therefore consider whether the trial court abused its discretion in denying leave to amend the complaint.

F. Amendment of the Complaint

When a demurrer is sustained without leave to amend, this court decides whether there is a reasonable possibility that any defect can be cured by amendment; "if it can be, the trial court has abused its discretion and we reverse; if not, there has been no abuse of discretion and we affirm. [Citations.] The burden of proving such reasonable possibility is squarely on the plaintiff. [Citation.]" (*Blank* v. *Kirwin* (1985) 39 Cal.3d 311, 318.)

Plaintiff has failed to carry this burden. She has amended the complaint on four occasions with no improved

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10 Plaintiff contends that if Dr. Gould's communications are protected by the privilege in Civil Code section 47 for "official proceedings," then he must have sought a court-ordered evaluation, "the only legal 'proceedings' provided by law." This is incorrect. The absolute privilege pursuant to Civil Code section 47 for "official proceedings" extends to numerous proceedings other than court-ordered evaluations, including police investigations. (See § II.A., ante.)

result.[11] She did not demonstrate to the trial court any manner in which a amendment would change the legal effect of her pleading, and she has made no such showing in her briefs before this court. Under applicable substantive law, it does not appear that there is any reasonable probability that the defects in plaintiff's fourth amended complaint can be cured by amendment. Consequently, the trial court did not abuse its discretion in denying further leave to amend the complaint.

G. Other issues raised by Defendant

In light of our conclusion that defendant's demurrer was properly sustained without leave to amend, we do not address additional arguments raised by Dr. Gould on appeal, such as the applicability of additional duties or privileges to defeat plaintiff's tort claims, the contention that portions of the complaint are vague and unintelligible, or the contention that plaintiff's pleadings should be stricken as a sham because plaintiff has alleged the same damages against other defendants in other cases.

H. Other Issues Raised by Plaintiff

1. Summary Judgment

On March 30, 1995, plaintiff filed a motion for summary judgment, contending that there was no question of fact as to each and every allegation set forth in her third amended complaint. On appeal,[12] plaintiff argues that the trial court's denial of this motion was in error. In light of our conclusion that plaintiff has failed to state a cause of action against Dr. Gould, the trial court's denial of plaintiff's motion for summary judgment was proper.

2. Denial of Motion to Seek Punitive Damages

Plaintiff also alleges that the trial court erred in denying her motion to seek punitive damages. In light of our

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11 We note that plaintiff, who has represented herself in this litigation, is held to the same standard of knowledge of law and procedure as is an attorney. (*People* v. *Clark* (1990) 50 Cal.3d 583, 625.) Plaintiff's pleadings are thus entitled to the same, but no greater, consideration than those of other parties and attorneys. (*Bianco* v. *California Highway Patrol* (1994) 24 Cal.App.4th 113, 1125-1126.)

12 The record before us does not indicate that any petition for a peremptory writ, pursuant to section 437c, subdivision *(l)* of the Code of Civil Procedure, was filed for review of the order denying plaintiff's motion for summary judgment.

conclusion that the demurrer was properly sustained without leave to amend, we find no error in the trial court's denial of this motion.[13]

3. Assignment of Case to a Single Judge

In January 1994, plaintiff moved to have this case assigned to a single judge for all purposes. This motion was denied by the court on February 14, 1994. On appeal, plaintiff contends that the denial of this motion was an abuse of discretion because the judicial assignment system spread the alleged defamation through the court system, allowed for inconsistent rulings, and made it more difficult to challenge a biased judge.

Although we understand plaintiff's concern that certain information involved in this litigation is personal, we presume the trial judges also understand such concerns. We find no abuse of discretion in the trial court's decision to handle this case, like other cases, according to its ordinary case assignment system and motion calendaring procedures. Although different judges considered defendant's grounds for demurrer, this was entirely appropriate; plaintiff filed numerous complaints, and defendant responded separately to each one.[14] The record does not indicate that plaintiff sought to make a challenge of any kind to a trial judge, or that she was deprived of any opportunity to do so.

4. Protective Order

On February 10, 1994, plaintiff moved the court for a protective order essentially precluding Dr. Gould from sharing any information regarding plaintiff with anyone other than one attorney. Dr. Gould opposed plaintiff's motion. After briefing and argument, the trial court entered a protective order, filed March 18, 1994. That order states, in part: "Defendant ROBERT GOULD, M.D., shall not

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13 Because plaintiff has failed to state a cause of action, no damages (punitive or otherwise) may be awarded on the basis of the complaint. Therefore, we need not reach the other issues raised by plaintiff regarding her punitive damages motion.

14 Plaintiff argues that Dr. Gould's demurrers to her prior complaints were sustained with leave to amend "without sufficient explanation (required by [Code of Civil Procedure section] 430.60 . . . ." We have reviewed these orders, and found that they contain sufficient statements of the grounds upon which the demurrers were granted. (See *Stevenson* v. *San Francisco Housing Authority* (1994) 24 Cal.App.4th 269, 275.)

voluntarily disclose plaintiff's medical records, absent a subpoena for same, to anyone other than his attorneys, experts and consultants in this litigation. [¶] The granting of plaintiff's motion for a protective order is made on the express understanding between parties, as stated by Commissioner Frischling in open court, that if defendant ROBERT GOULD, M.D., receives a subpoena for plaintiff's medical records, he will be obliged to produce the records to the subpoenaing party unless plaintiff CHERIEL JENSEN initiates a formal objection and files a Motion to Quash in the action in which the subpoena is issued."

On appeal, plaintiff contends: "The protective order extends very little protection. It merely indicates that plaintiff be notified if Gould receives a subpoena." This is incorrect. The order explicitly prohibits voluntary disclosure (absent a subpoena) to anyone other than Dr. Gould's attorneys, experts and consultants in this litigation." Plaintiff also argues that the order should be more restrictive, and should contain specific provisions concerning when Dr. Gould's records could be subject to subpoena. We disagree. The protective order granted by the court is entirely consistent with the statutory scheme set forth in section 1985.3 of the Code of Civil Procedure, as discussed in section II.D. *ante*. We therefore find no basis for the modifications requested by plaintiff.

5. Restrictions on Discovery

Plaintiff also appeals from the trial court's order, dated July 13, 1993, which plaintiff characterizes as an "[o]rder restricting discovery continuing to the present time . . . ." Plaintiff contends that this order improperly denied her the right "to conduct timely discovery, denied throughout the course of two and a half years, to determine other participants in Defendant Gould's fraud." (Example omitted.)

Additional procedural history is helpful in understanding the July 19, 1993, order. Plaintiff's original complaint in this case, filed April 9, 1993, stated that the "substance" of the complaint was originally filed October 7, 1992 in Federal Court." Dr. Gould moved the superior court to stay the state court case pending resolution of plaintiff's related proceeding against Dr. Gould in federal court. Over plaintiff's opposition, defendant's motion for stay was granted by the court's order dated July 19, 1993. This order stayed all further activity in the case, subject to further order

of the court, and stated, in part: "During oral argument, plaintiff CHERIEL JENSEN represented that she may have an urgent need to conduct discovery in the immediate action. She also indicated that she contemplated the necessity of seeking injunctive relief against defendant ROBERT GOULD, M.D. This order shall not be construed as precluding plaintiff from filing appropriate motions with the court concerning the conduct of discovery or the need for injunctive relief. However no discovery may be conducted by either of the parties until such time as an order providing leave to conduct specific discovery has been entered by the court." After the federal court proceeding had been resolved, on May 12, 1994, the trial court granted plaintiff's motion to return her state court case to active status.

We find no error in the trial court's decision granting a stay pending resolution of the federal case. "[W]hen a federal action has been filed covering the same subject matter as is involved in a California action, the California court has the discretion but not the obligation to stay the state court action." (*Caiafa Prof. Law Corp.* v. *State Farm Fire & Ca. Co.* (1993) 12 Cal.App.4th 800, 804.) Here, where plaintiff's federal action involved the same parties and sought damages arising from plaintiff's same October 7, 1991, office visit, the trial court was well within its discretion in determining that this case should be stayed pending the outcome of the federal action.

We also find no error in the court's discovery rulings contained in the July 19, 1993, order. By allowing discovery only with further court approval, the order protected both defendant's interest in avoiding excessive or duplicative discovery in a action that had been appropriately stayed, and plaintiff's ability to pursue specific discovery if necessary. Plaintiff does not argue that she sought leave from the court to conduct specific discovery at any time after the July 19, 1993 order.

DISPOSITION

The judgment is affirmed.

*(Unsigned)*
Cottle, P.J.

WE CONCUR:
Bamattre-Manoukian, J. *(Unsigned)*
Mihara, J. *(Unsigned)*

## Appendix 3

TYLER G. DRAA, ESQ., STATE BAR # 099619
LAW OFFICES OF HINSHAW, WINKLER, DRAA, MARSH & STILL, A PARTNERSHIP
ST. JAMES PARK BLDG., 152 NORTH THIRD STREET
SUITE 300, SAN JOSE, CALIFORNIA 95115-0030
(408) 293-5959 FAX (408) 280-0966
Attorneys for Defendant ROBERT S. GOULD

*[stamped]:* ENDORSED
FILED
Aug 21 4 03 PM '95

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

CHERIEL JENSEN — No. 730488

Plaintiff

v.

ROBERT S. GOULD, M.D.

Defendants.

/

JUDGMENT OF DISMISSAL BY COURT

This court having on August 2, 1995, ordered defendant GOULD, M.D.'s Demurrer to plaintiff's Fourth Amended Complaint sustained, without leave to amend,

It is hereby ordered, adjudged and decreed THAT PLAINTIFF'S ACTION AGAINST DEFENDANT GOULD, M. D., is dismissed, and plaintiff shall take nothing, and defendant GOULD, M.D. SHALL RECOVER FROM PLAINTIFF COSTS OF SUIT IN THE SUM OF $_____.

[STAMPED]
Dated: August 21, 1995

[stamped] PETER G. STONE

Hon. Peter G. Stone
Judge of the Superior Court

## Appendix 4

TYLER G. DRAA, ESQ., STATE BAR # 099619
LAW OFFICES OF HINSHAW, WINKLER, DRAA, MARSH & STILL, A PARTNERSHIP
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SUITE 300, SAN JOSE, CALIFORNIA 95115-0030
(408) 293-5959 FAX (408) 280-0966
Attorneys for Defendant ROBERT S. GOULD

*[stamped]:* ENDORSED
FILED
Aug 21 4 03 PM '95

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

CHERIEL JENSEN

Plaintiff

v.

ROBERT S. GOULD, M.D.

Defendants.

/

No. 730488

ORDER SUSTAINING DEFENDANT GOULD, M.D.'S DEMURRER WITHOUT LEAVE TO AMEND

DATE: July 27, 1995
Time: 9:00 a.m.
Dept: 17

The Demurrer of defendant ROBERT S. GOULD, M.D., to plaintiff's fourth amended complaint, and defendant GOULD, M.D.'s Motion to Strike Portions of Fourth Amended Complaint, came regularly for hearing by the court before The Honorable Peter G. Stone, on July 27, 1995.

Plaintiff CHERIEL JENSEN appeared in propria persona; Tyler G. Draa, Esq. appeared on behalf of defendant ROBERT S. GOULD, M.D.

After hearing, the matter was submitted to the court for ruling. The court, having read and considered the moving and opposing papers submitted in this matter, and having heard and considered oral argument on behalf of the parties, and good cause appearing therefore,

IT IS HEREBY ORDERED that defendant Gould, M.D.'s Demurer to Plaintiff's Fourth Amended Complaint is

SUSTAINED without leave to amend, on the following grounds:

Pursuant to Code of Civil Procedure section 430.10(e), the allegations of plaintiff's Fourth Amended Complaint fail to state facts sufficient to constitute any cause of action against Defendant Gould, M.D., because (1) Dr. Gould's report of plaintiff's suicide threat was privileged under Code of Civil Procedure section 47(b)(3) and therefore is not actionable, (2) Dr. Gould had an obligation to report his perception of plaintiff's suicide threat and compliance with his duty does not give rise to liability, (3) plaintiff's Fourth Amended Complaint does not plead any facts that would give her a cause of action, (4) Dr. Gould is exempt from liability for reporting plaintiff's suicide threat, by statute and under California law, (5) plaintiff's Fourth Amended Complaint is a sham and must be disregarded.

The Fourth Amended Complaint is also uncertain, ambiguous and unintelligible within the meaning of Code of Civil Procedure section 430.10(f).

Plaintiff has been given five opportunities to set forth one or more congnizable causes of action, but has failed or refused to do so."

Dated: August 21, 1995 [stamped]

Hon. Peter G. Stone
Judge of the Superior Court

Approved as to Form:

_____,

CHERIEL JENSEN

Plaintiff, in Pro Per

Dated: _____,

## Appendix 5

Cheriel Jensen
13737 Quito Road, Saratoga, CA 95070
408-379 0463

August 16, 1995

The Honorable Peter Stone
Santa Clara County Superior Court
191 North First Street
San Jose, CA 95113

RE: Jensen V. Gould, M.D., et. al.
Civil Action No. 730488

Dear Judge Stone,

Because my concerns relate to substance, and not to form, I address this letter to you rather than Mr. Draa in reference to the proposed order regarding the above matter.

You sustained Dr. Gould's demurrer to my complaint August 2, 1995, (postmarked to me August 5, 1995) without leave. No findings were made either verbally in court or by your order. In court you did not indicate what your ruling would be, nor did you indicate any findings or determinations.

Defendant has prepared a proposed order and I was given five days to review this proposed order and approve it as to form.

The order contains six findings, all of them out of conformance with Judge Levinger's preceding detailed determinations as clearly stated in the transcripts and order and your preceding orders. Your order directed that causes of action be separately stated. They have been. Judge Levinger's direction was that I was to

offer numerical amount of damages (transcripts 3:10-12) which I did, and to remove some code section references (transcripts 2:22-24) which I did.

None of Gould's proposed findings were stated in your order. None of the alleged facts in Gould's proposed order can be found in my complaint. None of the proposed findings conform to The Honorable Judge Levinger's findings. None of the proposed findings conform to Judge Ware's finding when he gave me leave to file in state court.

There was no trial in this case and thus findings of fact overruling the facts in the complaint are not appropriate, nor are Gould's arguments (excuses made in his defense) appropriate in the order.

I very much object to the substance of the proposed order fashioned by Mr. Draa in the following specific ways: (See attached proposed order.)

AS TO DRAA'S PROPOSED FINDING (1) Privilege: The Honorable Judge Levinger did not find this argument persuasive and disposed of it (transcripts, 2:7-8 and 3:6).

AS TO DRAA'S PROPOSED FINDING (2) Obligation:
The Honorable Judge Levinger overruled this argument (transcripts, 2:1-12 and 3:2-4).

AS TO DRAA'S PROPOSED FINDING (3) No facts giving rise to any Causes of Action: No judge has stricken any causes of action in response to any demurrer or five motion to strike. The Honorable Federal Judge Ware found valid state causes of action and that is why he gave me leave to file in state court. You did not rule on the current motion to strike but have not stricken any causes of action in your earlier orders. If any causes of action were deficient those findings should have been made in ruling on the demurrers that preceded this one. (Deficiencies indicated were limited to damages. If any causes of action were inappropriate as a matter of law they should have been

stricken. (All the causes of action have appeared before in earlier iterations.)

AS TO DRAA'S PROPOSED FINDING (4) Exemption from liability: The Honorable Judge Levinger overruled this concept (transcripts 2:1-6).

AS TO DRAA'S PROPOSED FINDING (5) Sham pleading charge: The Honorable Judge Levinger specifically overruled this charge (transcripts 2:13-14).

AS TO DRAA'S PROPOSED FINDING at line 21: The Complaint is not ambiguous and unintelligible within the meaning of Code of Civil Procedure section 430.10(f). It is clearly written, specific, supported by police findings and Gould's defamatory writings, and contains all essential elements according to Matthew Bender and Witkin. The Honorable Judge Levinger apparently understood it clearly, clearly enough to require only numerical damages in order to have granted summary judgment (transcripts 3:8-12). These changes were made in the Fourth Amendment.

I respectfully request that findings be made by the judiciary, not by the Defendant.

I respectfully request that Judge Levinger's findings not be overruled by inadvertence or otherwise. The Honorable Judge Levinger considered herself bound by Judge Nichols' order on punitive damages. The same concepts would seem to apply here, at least as to findings.

Yours truly,

[SIGNED]: Cheriel Jensen

Cheriel Jensen

Attachments: Judge Levinger's detailed transcripts
Judge Stone's order
Draa's Proposed order

cc: HAND DELIVERED 8/[by hand]:17/95
by [Signed] Cheriel Jensen_____
TO:

Tyler G. Draa
Hinshaw, Winkler, Draa, Marsh and Still
St. James Park Building
152 North Third Street, Suite 300
San Jose, CA. 95115-0030

## Appendix 6

*[stamped]:* FILED
Aug 02 '95
County Clerk
Santa Clara County
BY _____Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

| | |
|---|---|
| CHERIEL JENSEN | Case No. 730488 |
| Plaintiff | ORDER |
| vs. | |
| ROBERT S. GOULD, M.D. and DOES 1 through 10 | |
| Defendants. | |

The above matter was heard in Department 17. The Demurrer is sustained without leave.

[Stamped]
Dated: August 02 1995

[stamped] Peter G. Stone .
Peter G. Stone
Judge of the Superior Court

7ps7/vs

[SIGNED and CIRCLED]: KP

[record ref p. Supp. App. p. 000795]

## Appendix 7

TYLER G. DRAA, ESQ., STATE BAR # 099619
LAW OFFICES OF HINSHAW, WINKLER, DRAA, MARSH & STILL, A PARTNERSHIP
ST. JAMES PARK BLDG., 152 NORTH THIRD STREET
SUITE 300, SAN JOSE, CALIFORNIA 95115-0030
(408) 293-5959 FAX (408) 280-0966
Attorneys for Defendant ROBERT S. GOULD

*[stamped]:* ENDORSED
FILED
May 9, 95

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

CHERIEL JENSEN — No. 730488

Plaintiff

v.

ROBERT S. GOULD, M.D. et al.

Defendant . /

ORDER SUSTAINING DEMURRER AND DENYING MOTION MOTIONS FOR SUMMARY JUDGMENT

Defendant ROBERT S. GOULD, M.D.'s demurrer, Motion to Strike, and Motion for Summary Judgment was heard by the court on April 25, 1995. Plaintiff's Motion for Summary Judgment was also heard. Tyler G. Draa appeared on behalf of defendant Robert S. Gould M.D. Plaintiff CHERIEL JENSEN appeared in propria persona.

Defendant Robert S. Gould, M.D.'s Request that Judicial Notice be Taken of nine separate documents identified in a pleading filed February 6, 1995, was granted.

Defendant's Demurrer was sustained as to each and every cause of action set forth in plaintiff's Third Amended

Complaint based upon California Code of Civil Procedure section 430.10(e) ("Failure to State a Cause of Action") and 430.10(f) ("The Complaint is Uncertain"). Defendant's Demurrer is overruled on all other grounds raised in defendant's moving papers.

The court refrained from making any ruling on defendant's Motion to Strike Punitive Damages Allegations, as the motion was rendered moot by the sustaining of defendant's Demurrer.

Dr. Gould's Motion for summary judgment was denied on the grounds that there are questions of fact as to intentional tort allegations that are not necessarily resolved in the defendant's favor by submission of an expert declaration indicating the defendant's medical diagnosis, care and/or treatment of the patient was within the standard of care.

Plaintiff's Motion for Summary Judgment was denied. The court found that plaintiff failed to establish, as a matter of law, each and every element of her claims, in particular, the amount of damages.

Plaintiff shall have to and including Thursday, May 11, 1995, in which to file and serve a Fourth Amended Complaint.

Dated: May 8, 1995
*[stamped]*
MARY JO LEVINGER
THE HONORABLE MARY JO LEVINGER
JUDGE OF THE SUPERIOR COURT

## Appendix 8

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA
BEFORE THE HONORABLE MARY JO LEVINGER, JUDGE

---oOo---

| | |
|---|---|
| CHERIEL JENSEN<br><br>Plaintiff/Moving Party/Respondent<br>v.<br><br>ROBERT S. GOULD, M.D.,<br><br>Defendant /Respondent/Moving Party | ) No. 730488<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) |

---oOo---

REPORTER'S TRANSCRIPTS OF PROCEEDINGS

Motion

April 25, 1995

---oOo---

APPEARANCES

For the Plaintiff/Moving Party/Respondent: In Propria Persona

For the Defendant/Respondent/Moving Party:

Tyler G Draa, Esquire

Attorney At Law

Official Court Reporter: MAROLYN O. CHOW, CSR #2587

The following is a transcription of the proceedings had in the matter of Jensen v. Gould, M.D., requested, specifically, the court's instructions.

PARTIAL PROCEEDINGS

San Jose, California

April 25, 1995.

THE COURT: Line item 3: Jensen v. Gould.

MRS. JENSEN: Cheriel Jensen, plaintiff representing herself.

MR. DRAA: Tyler Draa appearing on behalf of defendant, Robert S. Gould, MD.

THE COURT: I would be happy to give some basis of the tentative ruling if that would be helpful for you, Miss Jensen?

MRS. JENSEN: (Witness moves head in an up and down motion.

THE COURT: All right. Did you see the tentative ruling that I posted outside? I don't know if you did or not.

MRS. JENSEN: No. I couldn't identify what the ruling was. I went out to look but - -

THE COURT: Let me just indicate it for you then. First, I'll do it generally; then I'll be more specific.

Granted judicial notice.

My tentative is to sustain the demurrer with leave to amend on the basis of uncertainty and failure to state a cause of action.

I might as well go through the whole thing right now.

With regard to the other basis of demurrer, the exemption from liability for reporting the suicide threat, I

would over rule it on that basis. The Schwartz and Fish cases involve statements made in good faith. The allegations here are the defendant's statements were made in bad faith, i.e., they were false, malicious, and intentional.

And I would also overrule it on the basis of immunity from liability, which comes up later in the summary judgment under Welfare and Institution's Code Section 5278: The plaintiff was not taken into custody nor the privilege does not bar the defamation claim, although it may relate to false imprisonment or invasion of privacy claims.

Also on Sham pleading, that basis, I am also overruling it. Relates to the federal claims. The fact that the plaintiff has alleged other defendants have caused her certain damages is not inconsistent with the possibility that the defendant caused the plaintiff to suffer damages, and the plaintiff is entitled to plead alternative theories.

On the -- both of the -- basis of sustaining the demurrer with leave to amend, that will make the motion to strike moot. I do note, though, however, that Judge Nichols has ruled on the punitive damages issues, so I suppose the references to Civil Code Section 3294 is surplusage, but they should not be there.

On the judgment motions as to Dr. Gould's motion for judgment, that would be denied. The defendant did not treat the plaintiff or perform any procedure on her. The claims are for defendant's statements to others, and that judgment must eliminate an element of each cause of action.

Defendant's standard of care argument does not defeat the alleged intentional torts, such as the defamation and invasion of privacy claims.

And, again, the privilege issue, Welfare and Institution's Code Section 5278, I do not find that pursuasive as mentioned above.

With regard to the plaintiff's motion for summary judgment, that also is denied. The plaintiff fails to offer a numerical amount of damages. She must establish each and every element of her claim, and the showing as to damages is insufficient.

That is the basis of the tentative rulings. You may address them briefly if you wish.

(Whereupon further proceedings were had, the transcription of that portion not requested.)

---oOo---

## Appendix 9

*[stamped]:* ( ENDORSED)
FILED
OCT 13, 94
County Clerk
Santa Clara County
BY [signed] Don DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

| | |
|---|---|
| CHERIEL JENSEN, | No. 730488 |
| Plaintiff, | ORDER |
| v. | |
| ROBERT S. GOULD, M.D., et al., | |
| Defendants. | |

Plaintiff's motion to include punitive damages in her second amended complaint, brought pursuant to CCP 425.13, heard on October 6, 1994 and submitted for decision on October 13, 1994, is denied.

October 13, 1994

[STAMPED]: LESLIE C. NICHOLS
LESLIE C. NICHOLS
JUDGE OF THE SUPERIOR COURT

## Appendix 10

TYLER G. DRAA, ESQ., State Bar No. 099619
MEGAN A. SMITH, ESQ State Bar No. 138327
LAW OFFICES OF HINSHAW, WINKLER, DRAA, MARSH & STILL, A PARTNERSHIP
ST. JAMES PARK BLDG., 152 NORTH THIRD STREET
SUITE 300, SAN JOSE, CALIFORNIA 95115-0030
(408) 293-5959 FAX (408) 280-0966
Attorneys for Defendant ROBERT S. GOULD

*[stamped]:* ( ENDORSED)
FILED
March 18, 11 25 AM '94

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SANTA CLARA

CHERIEL JENSEN — No. 730488

Plaintiff

v.

ROBERT S. GOULD, M.D. et al.

Defendant . /

ORDER ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER

The motion of plaintiff CHERIEL JENSEN for a protective order came on regularly for hearing on February 25, 1994, in Department 8B of the above-entitled court, Commissioner Jessica Frischling presiding. CHERIEL JENSEN, in pro per, appeared on her own behalf; Megan A. Smith appeared on behalf of defendant ROBERT GOULD, M.D. The court, having reviewed the moving and opposing papers, and having considered oral argument by the parties, and good cause appearing therefor,

IT IS HEREBY ORDERED that plaintiff JENSEN's motion for a protective order is GRANTED. Defendant ROBERT GOULD, M.D., shall not voluntarily disclose plaintiff's medical records, absent a subpoena for same, to anyone other than his attorneys, experts and consultants in this litigation.

The granting of plaintiff's motion for a protective order is made on the express understanding between the parties, as stated by Commissioner Frischling in open court, that if defendant ROBERT GOULD, M.D., receives a subpoena for plaintiff's medical records, he will be obliged to produce the records to the subpoenaing party unless plaintiff CHERIEL JENSEN initiates a formal objection and files a Motion to Quash in the action in which the subpoena is issued.

APPROVED AS TO FORM:
Dated March 4, 1995 [signed]

[Signed] Cheriel Jensen
Cheriel Jensen, Plaintiff
In Pro Per

Dated: March 17

*[stamped]*
JESSICA A. FRISCHLING
HONORABLE JESSICA FRISCHLING
Commissioner of the Superior Court

## Appendix 11

[STAMP] FILED
MARCH 10, 12 09 PM "93
RICHARD ___IEKING
CLERK
U.S. DISTRICT COURT
NO. DIST OF CA. S.J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

| | | |
|---|---|---|
| CHERIEL JENSEN<br>Plaintiff,<br>vs.<br><br>ROBERT S. GOULD, M.D., et al.<br><br>Defendants. | ) | No. C 92-20649 JW (EAI)<br><br>GRANTING MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AND DENYING MOTION FOR ENTRY OF DEFAULT JUDGMENT |

Plaintiff, proceeding pro se, asserts claims of constitutional violations of her civil rights under 42 U.S.C. § 1983 against Defendant physician, Dr. Robert Gould. Plaintiff also seeks to challenge Cal. Welfare § Inst. Code § 5000 et seq. as unconstitutional.

Plaintiff was referred to Defendant, a neurologist, and was seen by him once, on October 7, 1991. Plaintiff filed her action in district court on October 7, 1992 and filed an amended complaint November 13, 1992. Defendant has not filed an answer but has filed the instant motion to dismiss for lack of subject matter jurisdiction, Fed. R. Civ. P. 12(b)(1) and failure to state a claim, Fed. R. Civ. P. 12(b)(6). In the alternative Defendant moves for a more definitive statement, Fed. R. Civ. P. 12(e). Plaintiff moves for default judgment pursuant to Fed. R. Civ. P. 55.

The court hereby GRANTS the motion to dismiss for failure to state a claim. Plaintiff's complaint fails to state a claim under § 1983 as she has not presented allegations sufficient to support an inference of constitutional violation nor has she averred facts to support her claim that Defendant was acting under color of state law.

The court DENIES Defendant's motion to dismiss for lack of subject matter jurisdiction. Plaintiff's complaint is not deemed wholly insubstantial and frivolous. Bell v. Hood, 327 U.S. 678, 682-683 (1946).

Plaintiff may have claims against Defendant under state law, including a claim for defamation. However, the Court declines to exercise its supplemental jurisdiction to hear those claims. Under 28 U.S.C § 1367(b), the statute of limitations for Plaintiff's state law claims was tolled while those claims were pending in this court and tolling continues for 30 days after the federal claim has been dismissed, unless state law provides for a longer tolling period.

BACKGROUND

Plaintiff, Cheriel Jensen, suffers from pain and paralysis in her arms and hands and a restricted range of movement in her neck. She asserts her condition is due to compression of nerves in her cervical spine and from exposure to pesticides. Her treating physician referred her to Defendant, a neurologist, for testing and evaluation.

There is a dispute as to what transpired during her examination. Plaintiff contends that Defendant did not review the information and x rays that she brought to the examination and instead repeatedly asked whether she was depressed. Defendant maintains that he reviewed a number of the x rays and performed some physical tests on plaintiff. He noted that Plaintiff's reflexes were "markedly flat" and he therefore asked Plaintiff if she was feeling depressed. Defendant contends that Plaintiff acknowledged feeling suicidal at that time. Plaintiff denies this and maintains she was not suicidal although she was experiencing severe discomfort and pain.

Defendant asserts that on the basis of Plaintiff's statements regarding her mental health and her responses during the physical exam, he concluded that she was suicidal. He telephoned her husband and the police to advise them that Plaintiff was a danger to herself.

That afternoon a senior supervisor at Plaintiff's office asked Plaintiff if she had indeed threatened suicide during her doctor's appointment. Later, two San Jose police officers came to Plaintiff's office in response to the phone call form

Defendant. The police officers met with Plaintiff in a conference room and after a brief period they telephoned Defendant and advised him that they determined that she was not a danger to herself. Complaint ¶¶ 31-34.

During the time of the police officers' presence, Plaintiff was allegedly not allowed to leave the Planning office nor was she allowed to use the bathroom before meeting with the officers. Plaintiff contends that one of the officers waived a pair of handcuffs in a threatening manner. Other employees were present when the officers arrived.

After the visit by the officers, Plaintiff went to a physical therapy appointment. She returned to work the next day but was in severe physical discomfort. Plaintiff has been on medical leave since July 1, 1992 and she has attempted to collect disability through Workers Compensation.

Plaintiff alleges that Defendant's actions and statements to others violated a number of her constitutional rights. She maintains that his actions caused her a loss of freedom, Complaint ¶ 54, a loss of privacy, Complaint ¶ 62-64; violated her right to dignity and good reputation, Complaint ¶ 70, and her right to pursue health and happiness, Complaint ¶ 69. She contends that Defendant's actions violated her rights under the First, Fourth, Ninth Thirteenth and Fourteenth amendments to the United States Constitution. Complaint at 62, 65. She also alleges that Defendant's misrepresentations about her mental state aggravated her injuries. Complaint ¶ 67. She contends that the misrepresentations have caused her a loss of consortium and damaged her family relations. Complaint ¶¶ 65, 70. Finally, she maintains that Defendant's misrepresentations constitute defamation and injury to her professional reputation. Complaint ¶¶ 71, 72.

Plaintiff contends that Cal. Welfare & Inst. Code § 5000 et seq. is unconstitutional because it allows detention in violation of due process rights guaranteed by the Fifth and Fourteenth Amendments. Complaint ¶ 57. She also asserts that the statute violates Article I of the California Constitution, Complaint ¶ 58; constitutes cruel and unusual punishment in violation of the Eighth Amendment, Complaint ¶ 59; and allows commitment of individuals based on their speech in violation of the First Amendment, Complaint ¶¶ 60, 61.

Plaintiff also alleges claims for grand theft based on being billed by Defendant for testing procedures never performed. Complaint ¶¶ 75, 76.

DISCUSSION

**Legal Standard**

In order to state a claim under § 1983 for violation of civil rights, Plaintiff must allege two essential elements: (1) a violation of a right secured by the Constitution or laws of the United States, and (2) that the alleged deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988)

The Supreme Court has directed trial courts to liberally construe pro se papers, Hughes v. Rowe, 449 U.S. 5, 9 (1980), especially where civil rights claims are alleged. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th ir. 1988).

**Motion to Dismiss**

On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the complaint is construed in the light most favorable to the plaintiff. Russell v. Landrieu, 621 F.2d 1037, 1039 (9th Cir. 1980). The court must accept as true all material allegations in the complaint as well as reasonable inferences to be drawn from them, NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986).

A complaint will not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 335 U.S. 41, 45-46 (1957); Moore v. City of Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989) cert. denied, 496 U.S. 906 (1990). However, Plaintiff must provide more than conclusionary allegations in order to defeat a motion to dismiss. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988) (citing McCarthy v. Mayo, 827 F.2d 1310, 1317 (9th Cir. 1987)).

In reviewing a motion to dismiss for failure to state a claim, the Court considers only material contained in the pleadings, unless the motion is converted into a motion for summary judgment. Fed. R. Civ. P. 12(b). In the instant motion the court does not consider the extrinsic materials

submitted by the parties and bases its decision on the matters contained in the pleadings.

**Analysis**

**1. Violation of a Right Secured by the Constitution**

Plaintiff has not alleged facts sufficient to support a claim that specific rights guaranteed by the Constitution were violated. As Plaintiff provides in her papers, the police went to her place of employment and talked with her pursuant to the Defendant's phone call advising them that Plaintiff was a danger to herself. Although she may have been detained for the purpose of the interview with police, Plaintiff was not taken into custody.

Pursuant to Cal. Welfare & Inst. Code § 5150, when a person poses a danger to herself as a result of a mental disorder, a peace officer may, upon probable cause, take a person into custody and place him or her in a facility designated by the county for 7-hour treatment and evaluation. Here, the police officers determined after speaking with Plaintiff that there was not probable cause to take Plaintiff into custody.

As the Ninth Circuit observed in Doe v. Gallinot, 657 F.2d 1017, 1021 (9th Cir. 1981): "Involuntary commitment to a mental treatment facility implicates an important, constitutionally-protected liberty interest[.]" This interest may not be infringed upon without complying with minimum due process standards. Id. However, in the instant action, Plaintiff was never committed for mental treatment. She was contacted and interviewed by the police at her place of employment. Thus, her allegations of constitutional violations based on actions taken pursuant to § 5000 fail to state a claim.

Plaintiff's contentions of violation of her rights under the First, Fourth, Fifth, Eighth, Ninth, Thirteenth and Fourteenth Amendments fail in that she has not alleged actions or injuries from which it is reasonable to infer constitutional deprivation. As noted, Plaintiff may have state law claims against Defendant in tort which she may pursue in state court.

Plaintiff also asserts that Defendant's statements to police and her husband regarding her purported suicidal mental state constitute defamation. However, allegations of defamation do not present a constitutional claim. See, Paul v. Davis, 424 U.S. 693, 701-710 (1975); Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1353 (9th Cir. 1981). Nor is her claim of injury to her reputation actionable under § 1983. Paul, 424 U.S. at 701. Taking all of Plaintiff's allegations as true, the complaint does not support a claim that she suffered constitutional deprivation.

**2. Under Color of State Law Requirement**

Defendant Dr. Gould is a private citizen. He maintains in his papers that he acted pursuant to his duty as a physician to take reasonable care in instances where it is determined that the patient poses a danger to herself or others. Plaintiff alleges that Defendant acted under color of state law in contacting the police and her husband and advising them that she was suicidal.

Private citizens can only be liable under § 1983 if facts are alleged and proved which link their actions to the actions of state actors. See, Dennis v. Sparks, 449 U.S. 24, 27-28 (1980); Collins v. Womancare, 878 F.2d 1145, 1155-56 (9th Circ.), cert denied, 493 U.S. 1056 (1989). In order to constitute an act under color of state law, Plaintiff must allege facts to support an inference that Defendant was "jointly engaged with state officials in the challenged action." Collins, 878 F.2d at 1154 (quoting Dennis v. Sparks, 449 U.S. at 27-28). There must be a substantial degree of cooperative action between the private party and the state. Id.

Here the police interviewed Plaintiff in response to Defendant's phone call but Plaintiff was not taken into custody. The police made their own determination regarding Plaintiff's alleged suicidal state. As the Ninth Circuit noted in Collins, 878 F.2d at 1155, making a complaint to police does not convert a private party into a state actor, nor does the execution by a private party of a sworn complaint which forms the basis of an arrest. (citations omitted). Thus, the interview with police and the officer's determination that Plaintiff was not a danger to herself is not sufficient to turn

Defendant's conduct into action taken under color of state law.

As Plaintiff notes in her complaint, Cal. Welfare & Inst. Code § 5259.1 provides for an action for money damages against individuals who are knowingly and willfully responsible for detaining a person in violation of the provisions of § 5000. Plaintiff may therefore have a claim against defendant under the statutory provision. She may also have a claim for defamation or other tortuous conduct against Defendant for injury allegedly caused by his communications with police and the Plaintiff's husband. However Defendant's actions are not cognizable as conduct under color of state law.

**Motion to Default Judgment**

Federal Rule 55(a) provides that "[W]hen a party against whom a judgment for affirmative relief is sought has failed to plead or to otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default."

Here, Plaintiff served the summons and amended complaint on Defendant via mail to Defendant on November 16, 1992. In the Acknowledgment of Receipt of Summons and Complaint, Defendant states that he received the documents on November 17, 1992, although in his Opposition to Motion for Default he states he received the Summons and Complaint on November 18, 1992. Oppos. to Default at 2.

Pursuant to Rule 4(c)(2)(C)(ii), service is effective on the date Defendant signs the Acknowledgment if it is mailed back within 20 days of the date it was mailed to Defendant. Worrell v. B.F. Goodrich Co., 845 F.2d 840, 842 (9th Cir. 1988), cert. denied, 491 U.S. 907 (1989).

Twenty days from the date Plaintiff mailed the summons and complaint would be December 7, 1992. Defendant filed his Acknowledgment with the court on December 9, 1992 and maintains that he also served Plaintiff with the Acknowledgment on December 9, 1992. Plaintiff contends that she never received a copy of the Acknowledgment, however she did not attempt to follow up

service by personal delivery as directed by the Rule 4(c)(2)(C)(ii).

Pursuant to Fed. R. Civ. P. P. 1, the Federal Rules shall be construed to secure the just, speedy, and inexpensive determination of every action. Thus, the court does not demand hyper-technical compliance and deems service effective on December 9, 1992.

Defendant filed his motion to dismiss on December 30, 1992. Accepting December 9, 1992 as the date of effective service, Defendant had twenty days from that date to file his answer or Rule 12 motion. See, Fed R. Civ. P. 12(a). Defendant maintains that his motion was filed one day late and he argues that a one -day delay is not sufficient grounds to enter a default judgment. The court agrees. The filing of the motion to dismiss demonstrates Defendant's intent to defend the action.

Moreover, Plaintiff's motion for entry of default was not filed until January 13, 1993, nearly two weeks after Defendant's motion to dismiss was filed. Plaintiff had made no showing of prejudice caused by Defendant's failure to strictly comply with time requirements of the Federal Rules." Draper v. Coombs, 792 F.2d 915, 924-925 (9th Cir. 1986). Default judgment is therefore not appropriate and the motion is denied.

CONCLUSION

Plaintiff has failed to state a claim under § 1983. She has presented factual allegations insufficient to support a claim of violation of constitutionally protected rights, Moreover, her allegations do not support an inference that Defendant's actions were taken under color of state law. As Plaintiff has not alleged facts which would entitle her to relief for constitutional violations under § 1983, her complaint is DISMISSED WITH PREJUDICE.

Plaintiff's motion for entry of default judgment is DENIED.

Good cause Appearing, IT IS SO ORDERED.
DATED: March 10, 1993

[SIGNED] James Ware
HONORABLE JAMES WARE
United States District Judge

## Appendix 12

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RICHARD ___IEKING
CLERK
U.S. DISTRICT COURT
NO. DIST OF CA. S.J.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

| | | |
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| CHERIEL JENSEN | ) | No. C-92-20649 JW (EAI) |
| Plaintiff, | ) | |
| vs. | ) | JUDGMENT |
| | ) | |
| ROBERT S. GOULD, M.D., et al | ) | |
| | ) | |
| | ) | |
| Defendants. | ) | |

Pursuant to this Court's order of this date granting Defendant's motion to dismiss Plaintiff's complaint, judgment is hereby entered in favor of Defendant Robert S; Gould, et. al., and against Plaintiff Cheriel Jensen.

This action is dismissed with prejudice.

IT IS SO ORDERED.

DATED: March 10, 1993

[SIGNED] James Ware

HONORABLE JAMES WARE

United States District Judge

## Appendix 13

(STAMP) FILED
February 14 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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|---|---|
| CHERIEL JENSEN<br>Plaintiff-Appellant,<br>v. ) | No. C 93-15761<br><br>D.C. No. CV-92-20649-JW |
| ROBERT S. GOULD, M.D.,<br>et al<br><br>Defendant-Appellee. | MEMORANDUM* |

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding
Submitted February 7, 1994**

Before: SCHROEDER, CANBY, and WIGGINS, Circuit Judges.

Cheriel Jensen appeals pro se the district court's dismissal of her 42 U.S.C § 1983 civil rights complaint. Jensen alleged that her civil rights were violated when the defendant reported her to police as a suicide threat who should be confined involuntarily pursuant to California law. The district court determined that Jensen failed to state a claim for which relief could be granted, and dismissed the complaint pursuant to Fed. R. Civ. P. 12 (b)(6). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review the district court's dismissal of a complaint pursuant to Fed. R. Civ. P. 12(b)(6) de novo. Oscar v.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, Jensen's request for oral argument is denied..

University Students Co-op, Ass'n, 965 F.2d 783, 785 (9th Cir.) (en banc), cert. denied, 113 S.Ct. 655 (1992). Our review is based on the contents of the complaint; we accept the allegations of the complaint as true and construe them in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). Dismissal if [sic] proper only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.

To prove a violation of section 1983, Jensen must show that the defendant (1) deprived her of a right guaranteed by the Constitution, and (2) acted under color of state law. See Collins v. Womancare, 878 F.2d 1145, 1147 (9th Cir. 1989), cert denied, 493 U.S. 1056 (1990); Leer v. Murphy, 844 F.2d 628, 632-33 (9th Cir. 1988). A defendant who is not a state official and who acts contrary to established state policy does not act under color of state law. See Lugar v. Edmondson Oil Co. , 457 U.S. 922. 940 (1982) (defendants' actions that are not authorized by state law cannot be attributed to state); Collins, 878 F.2d at 1152-53 (although state officials may be held liable for abuse of authority granted under state law, private parties may not).

Here Jensen alleges in her complaint that she visited Gould, a doctor, for neurological testing. She alleges that Gould performed no tests, ad instead questioned her at some length about depression. After Jensen left Gould's office, Gould contacted the police, Jensen's husband, and Jensen's employer to report that she was suicidal. He requested that police take Jensen into custody pursuant to Cal. Welfare & Inst. Code § 5150.[1] The police came to Jensen's workplace and questioned her regarding her visit to Gould. Jensen alleges that the police threatened to handcuff her and would not allow her to use the bathroom or leave to attend a physical therapy appointment. Following questioning, the police determined that Jensen was not suicidal and did not take her into custody.

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1 Cal Welfare & Inst. Code § 5150 provides that any person who, as a result of a mental disorder, is a danger to himself or others may be involuntarily taken into custody for 72 hours. This may be done upon probable cause, by a police officer, member of the attending staff of an evaluation facility, or any other professional person designated by the county.

Jensen claims that Gould's act of reporting her to police authorities pursuant to Cal. Welfare & Inst. Code § 5202 violated her constitutional rights, and that the statute is thus unconstitutional. "involuntary commitment to a mental treatment facility implicates an important, constitutionally protected liberty interest of the person committed." Doe v. Gallinot, 657 F.2d 1017, 1021 (9th Cir. 1981). However, Jensen was not taken into custody and confined; she was questioned by police, who determined that she should not be so confined. We have previously upheld the district court's finding that a 72-hour detention based on Cal. Welfare § Institution's Code § 5000, et. seq., is justified as an emergency measure, provided a probable cause hearing is held shortly thereafter. See id. at 1022. Accordingly, Jensen's claim that the statute is unconstitutional as applied to her must fail. See id.[2]

Jensen also alleges that Gould violated her constitutional rights to personal and marital privacy, defamed her, and damaged her professional reputation by telling her husband, her employer, and others she was suicidal. However, these acts fall outside the California statute allowing for involuntary confinement. Gould's acts thus cannot be ascribed to the state. See Lugar, 457 U.S. at 940; Collins, 878 F.2d at 1152-53. Accordingly, the district court properly determined that Jensen failed to show that Gould acted under color of state law regarding these claims. See Collins, 878 F.2d at 1147; Leer, 844 F.2d at 632-33.

Construing the allegations of the complaint most favorable to Jensen, we find that she can prove no set of facts which would entitle her to relief. Therefore, her complaint was properly dismissed pursuant to Fed. R. Civ. P. 12 (b) (6). See Love, 915 F.2d at 1245.

**Affirmed.**[3]

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2 Jensen also seeks to challenge the constitutionality of other provisions of the statute. However, she has no standing to challenge the statute except as it was applied to her. See Warth v. Sedlin, 422 U.S. 490, 499 (1975) (plaintiff must have suffered a threatened or actual injury resulting from the challenged action).

3 All pending motions are denied.

## Appendix 14

(STAMP) FILED
April 14 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| CHERIEL JENSEN<br>Plaintiff-Appellant,<br>v.<br><br>ROBERT S. GOULD, M.D., et al<br><br>Defendant-Appellee. | ) | No. C 93-15761<br><br>D.C. No. CV-92-20649-JW<br>Northern California<br>(San Jose)<br><br>ORDER |

Before: SCHROEDER, CANBY, and WIGGINS, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed R. App. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

## Appendix 15

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to Cheriel Jensen

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Event History for: #P912800648

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| Dispatched | 10/07/91 | 14:13:16 | BY SJ01 /0412 |
| Enroute | 10/07/91 | 14:13:19 | |
| Onscene | 10/07/91 | 14:15:30 | |
| Closed | 10/07/91 | 14:40:13 | |

Initial Type: WELCK Initial Alarm Level: Final Alarm Level:
Final Type: WELCK (WELFARE CHECK) Pri: 2 Dispo: U
Police Block: 135 Fire Block: 691 Lic: Amb:
Map Page: 3770 Group: DR Beat: R4 Src: Voice Tape:
P003 Contact:
Loc: 70 W HEDDING ST, SJ btwn N 1st & SAN PEDRO ST
Loci: **COUNTY OF SC PLANNING DEPT
Name: Los Gatos PD/#99 Addr: Phone:
1348 (0424) ENTRY

JENSEN, CHERIEL DOB/050139,,WFA,503,125..LONG
HAIR IN BUN,LSW/WHI SHIRT GY Y PANTS...
PER DR.AFTR EARLIER APT, SED SHE WAS GOING TO
JUMP OFF A BRIDGE.
DR. GOULD 866-4866.. PLZ 952 TO DR,
DR WANTS 72 HR HOLD IF SHE DOES NOT FIT TXT:
CRITERIA FOR 72 HR HOLD,,
10-21 DR FROM THE SCENE,,
HE WILL DO THE PAPERWO RK.

HE IS ALMOST SURE THAT SHE IS GOING TO DO SOMETHING TO HERSELF

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| /1415 | | *ONSCNE | 51R4 | |
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## Appendix 16

### FEDERAL CONSTITUTION, RELATED GOVERNANCE:

**42 U.S.C. § 1983. Civil action for deprivation of rights**
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress. . . .

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**28 U.S.C. § 1343. Civil rights and elective franchise**
(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

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**Declaration of Independence:**
We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the Pursuit of Happiness.

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**The Constitution of the United States, Preamble:**
We the people of the United States, in order to establish a more perfect Union, establish justice, ensure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution of the United States of America.

**First Amendment:** Article I. Congress shall make no law . . . abridging the freedom of speech . . . .

**Fourth Amendment:** Article II. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue except on probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

**Fifth Amendment:** Article III. No person shall . . . be deprived of . . . life, liberty, or property . . . without due process of law . . .

**Eighth Amendment:** Article VIII. Excessive bail shall not be required . . . , nor cruel and unusual punishments inflicted.

**Ninth Amendment:** Article XI. The enumeration in the constitution of certain rights shall not be construed to deny or disparage others retained by the people.

**Tenth Amendment:** Article X. The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

**Fourteenth Amendment:** Article XIV. . . . No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## Appendix 17

### CALIFORNIA CONSTITUTION AND CODE SECTIONS:

**California Constitution, Article 1: § 1.** Inalienable rights

Section 1. All people are by nature free and independent and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness and privacy.
(Am. Nov. 5, 1974.) (Privacy originally added Nov. 7, 1972.)

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**California Constitution, Art. 1 § 24. Rights not dependent on federal constitution; rights reserved to the people**

Sec. 24 Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

This declaration of rights may not be construed to impair or deny others retained by the people.

(Added Nov. 1974.)

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**California Civil Code: § 43. General Personal Rights**

Besides the personal rights mentioned and recognized in the Government Code, every person has, subject to the qualifications and restrictions provided by law, the right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.

**California Civil Code, § 45. Libel**

*Libel what.* Libel is false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him

to be shunned or avoided, or which has a tendency to injure him in his occupation.

**California Civil Code, § 45a. Libel on its face; other actionable defamatory language**

A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face. Defamatory language not libelous on its face is not actionable unless the plaintiff alleges and proves that he has suffered special damage as a proximate result thereof. Special damage is defined in Section 48a of this code.

**California Civil Code, § 46. Slander, false and unprivileged publications which constitute**

Slander is a false and unprivileged publication, orally uttered, and also communication by radio or any mechanical or other means which:

1. Charges any person with crime . . . .
2. Imputes on him the present existence of an infectious, contagious, or loathsome disease;
3. Tends to directly injure him in respect to his office, profession, trade or business, either by imputing something by reference to his office, profession, trade, or business that has a natural tendency to lessen its profits;
4. . . . .
5. Which by natural consequence causes actual damage.

**California Civil Code, § 47. subd. (b) Privileged publication or broadcast**

(b) A privileged publication or broadcast is one made: (b) In any (1) legislative proceeding, (2) judicial proceeding, (3) In any other official proceeding authorized by law or (4) in the initiation or course of any other proceeding authorized by law and reviewable by [mandate action] . . . , provided that an allegation or averment contained in any pleading or affidavit filed in an action for divorce or an action prosecuted under Section 137 of this code made of or concerning a person by or against whom no affirmation relief is prayed in such an action shall not be privileged publication or broadcast as to the person making said allegation or averment within the meaning of this section unless such pleading be

verified or affidavit sworn to, and be made without malice, by one having reasonable and probable cause for believing the truth of such allegation or averment and unless such allegation or averment be material and relevant to the issues in such action.

**California Civil Code § 56.10, subdivision (c)**
"A provider of health care may disclose medical information as follows: [¶] (1) The information may be disclosed to providers of health care or other health care professionals or facilities for the purposes of diagnosis or treatment of the patient

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**California Code Civ. Proc., § 425.10**

A complaint or cross complaint shall contain both of the following:
(a) A statement of facts constituting the cause of action, in ordinary and concise language.
(b) A demand for judgment for the relief to which the pleader claims he is entitled. If the recovery of money or damages be demanded, the amount thereof shall be stated, unless the action is brought in the superior court to recover actual or punitive damages for personal injury or wrongful death, in which case the amount thereof shall not be stated.

**California Code Civ. Proc., § 425.13** Negligence actions against health care providers; claims for punitive damages; amended pleadings

(a) In any action for damages arising out of the professional negligence of a health care provider, no claim for punitive damages • • • shall be included in the complaint or other pleading unless the court enters an order allowing an amended pleading that includes a claim for punitive damages to be filed. The court may allow the filing of an amended pleading claiming punitive damages on a motion by the party seeking the amended pleading and on the basis of the supporting and opposing affidavits presented that the plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294 of the Civil Code. The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed

within two years after the complaint or initial pleading is filed or not less than nine months before the date the matter is first set for trial, whichever is earlier.

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**California Welfare and Institution's Code § 5150. Dangerous or gravely disabled person; taking into custody; application; basis of probable cause; liability**

When any person, as a result of mental disorder, is a danger to others, or to himself or herself, or gravely disabled, a peace officer, member of the attending staff, as designated by the county, designated members of the mobile crisis team provided by Section 5651.7, or other professional person designated by the county may, upon probable cause, take, or cause to be taken, the person into custody and place him or her in a facility designated by the county and approved for 72-hour treatment and evaluation.

Such facility shall require an application in writing stating the circumstances under which the person's condition was called to the attention of the officer, member of the attending staff, or professional person, and stating that the officer, member of the attending staff, or professional person has probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled. If the probable cause is based on the statement of a person other than the officer, member of the attending staff, or professional person, such person shall be liable in a civil action for intentionally giving a statement which he knows to be false.

**California Welfare and Institutions Code § 5201.** Any individual may apply to the person or agency designated by the county for a petition alleging that there is in the county a person who is, as a result of mental disorder a danger to others, or to himself, or is gravely disabled, and requesting that an evaluation of the person's condition be made.

**California Welfare and Institutions Code § 5202.** Prepetition screening: report of findings

The person or agency designated by the county shall prepare the petition and all other forms required in the proceeding, and shall be responsible for filing the petition. Before filing the petition, the person or agency designated by the county shall request the person or agency designated by

the county and approved by the State Department of Mental Health to provide prepetition screening to determine whether there is probable cause to believe the allegations. The person or agency providing prepetition screening shall conduct a reasonable investigation of the allegations and make a reasonable effort to personally interview the subject of the petition. The screening shall also determine whether the person will agree voluntarily to receive crisis intervention services or an evaluation in his own home or in a facility designated by the county and approved by the State Department of Mental Health. Following prepetition screening, the person or agency designated by the county shall file a petition if satisfied that there is probable cause to believe that the person is, as a result of mental disorder, a danger to others, or to himself or herself, or gravely disabled, and that the person will not voluntarily receive evaluation or crisis intervention.

If the petition is filed, it shall be accompanied by a report containing the findings of the person or agency designated by the county to provide prepetition screening. The prepetition screening report submitted to the superior court shall be confidential and shall be subject to the provisions of Section 5328.

**California Welfare and Institutions Code § 5203.** False application for petition; offense; civil liability

Any individual who seeks a petition for a court-ordered evaluation knowing that the person for whom the petition is sought is not, as a result of mental disorder, a danger to himself, or to others, or gravely disabled is guilty of a misdemeanor, and may be held liable in civil damages by the person against whom the petition was sought.

**California Welfare and Institutions Code § 5204.** Petition; contents

The petition for a court ordered evaluation shall contain the following:

(a) The name and address of the petitioner and his interest in the case.

(b) The name of the person alleged, as a result of mental disorder, to be a danger to others, or to himself, or to be gravely disabled, and if known to the petitioner, the

address, age, sex, marital status, and occupation of the person.

(c) The facts upon which the allegations of the petition are based.

(d) The name of, as a respondent thereto, every person known or believed by the petitioner to be legally responsible for the care, support, and maintenance of the person alleged, as a result of mental disorder, to be a danger to others, or to himself, or gravely disabled, and the address of each such person, if known to the petitioner.

(e) Such other information as the court may require.

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**California Evidence Code § 912.**

(a) Except as otherwise provided in this section, the right of any person to claim a privilege provided by . . . Section 994 (physician-patient privilege), . . . is waived with respect to a communication protected by such a privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to such disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including the failure to claim privilege in any proceeding in which the holder has legal standing and an opportunity to claim knowledge.

**California Evidence Code § 992. "Confidential communication between patient and physician".**

As used in this article, "confidential communication between patient and physician" means information, including information obtained by an examination of the patient, transmitted between a patient and his physician in the course of that relationship and in confidence by a means which, so far as the patient is aware, discloses the information to no third persons other than those who are present to further the interest of the patient in consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the physician is consulted, and includes a diagnosis made and the advice given by the physician in the course of that relationship.

**California Evidence Code § 993. "Holder of the privilege".**

As used in this article, "holder of the privilege" means:

(a) The patient when he has no guardian or conservator. . . . .

**California Evidence Code § 994. Physician-patient privilege.** Subject to Section 912 and except as other wise provided in this article, the patient, whether or not a party, has privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between the patient and physician if the privilege is claimed by:

(a) The holder of the privilege;

. . . .

(c) The person who was the physician at the time of the confidential communication, but such person may not claim privilege if there is no holder of the privilege in existence or if he is otherwise instructed by the person authorized to permit disclosure.

**California Evidence Code § 995. When physician is required to claim privilege.** The physician who received or made a communication subject to the privilege under this article shall claim the privilege under this article whenever he is present when the communication is sought to be disclosed and is authorized to claim the privilege under subdivision (c) of Section 994. to Section 912 and except as other wise provided in this article, the patient, whether or not a party,

**California Evidence Code § 996. Exception: Patient-litigation exception.** There is no privilege under this article as to communication relevant to an issue concerning the condition of the patient if such issue has been tendered by:

(a) The patient:

. . . .